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January 8, 2004

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Marlene H. Dortch, Secretary
Federal Communications Commission
The Portals - 445 Twelfth Street, S.W.
12th Street Lobby, TW-A325
Washington, D C. 20554

Re: Ex Parte Presentation in CC Docket Nos. 96-262 and 01-92

Dear Ms. Dortch:

Pursuant to Section 1.1206 of the Commission's rules, NewSouth Communications ("NewSouth") hereby files this notice of ex parte meeting. On January 7, 2004, Jake E Jennings, Senior Vice President, Regulatory Affairs, NewSouth, and I met with Christopher Libertelli in Chairman Powell's office to discuss matters in the above-captioned proceeding. In accordance with the rules, NewSouth requests that a copy of this ex parte notice be placed in the public file in this proceeding.

NewSouth is a facilities-based CLEC that is providing the benefits of competition to consumers through carrier contracts entered into and tariffs filed pursuant to Commission Orders New South could be materially affected by decisions that the Commission could make in the context of a Qwest Petition for Clarification and/or Reconsideration filed with respect to the *Seventh Report and Order* in CC Docket No. 96-262 and a US LEC Petition for Declaratory Ruling Regarding LEC Access Charges for CMRS Traffic. NewSouth urged the Commission not to take action that would call into question current contracts and tariffs based on standard industry interpretations of existing Commission Orders.

In the past, a number of CLECs have entered into contracts with CMRS carriers to jointly provision access services to end users, provide transport services and other access services in accordance with Commission rules and policies. Many of these contracts were entered into prior to the *Seventh Report and Order* and all were entered into before the more recent *Sprint PCS Declaratory Ruling*, 17 FCC Rcd 13192 (2002) IXCs have been fully aware of these arrangements in the context of access arrangements both before and after the *Seventh Report and Order.*

These arrangements were entered into in good faith in reliance on the Commission rules that were in existence at that time. These rules never indicated that there was any prohibition against such practices Even after the *Seventh Report and Order* was adopted, no one in the industry took the position that the Order's benchmark would not apply to the type of arrangement at issue here. Indeed, nowhere in that Order is there any indication that jointly provided access is prohibited. Indeed, jointly provided access has been specifically approved by the Commission in other

contexts, so there was every reason to believe that joint provision was also permitted for CLECs charging benchmark rates Some parties have argued that paragraph 55 of that Order prohibits these practices. However, that paragraph doesn't address jointly provided access and never indicates that the arrangements in question are not switched access services that are ineligible to charge the Commission's prescribed benchmark rate. Furthermore, paragraph 58 of that Order also does not proscribe jointly provided access. Rather, that paragraph only addresses in what geographic markets a CLEC may use the ramp down benchmark rate, and which markets the CLEC must immediately charge the corresponding ILEC rates The paragraph permits the CLEC to charge the ramp down rate in the markets where the ILEC was then serving end users, but does not say that the end user must directly be served by the CLEC. In addition, new services in the existing markets were also eligible for the ramp down rates. This is the way the entire industry interpreted this paragraph, showing that this language was never intended to establish a test that jointly provided access with a CMRS carrier was not permitted. There is no other language in the order that excluded this type of arrangement from the benchmark rules.

NewSouth is not advocating here what the Commission's policy or rules should be for the future with respect to the type of access arrangement under consideration. However, retroactive prohibition of this type of arrangement would seriously disrupt industry arrangements, and lead to years of litigation or possibly disruptive self-help actions by IXCs. In situations such as these where a rule permitted the activities in question and would materially harm the parties against whom the rule change would be enforced militate strongly against retroactive application

The law does not permit the Commission to retroactively apply the new policy prohibiting these arrangements for three reasons. First, retroactively applying the new policy would impose financial penalties on carriers when a rule did not clearly prohibit its actions in violation of *Trinity Broadcasting*. Second, the practice at issue here was governed by a tariff filed at the Commission that is presumed lawful. The FCC cannot retroactively modify a valid tariff retroactively under the filed rate doctrine and the principles of Section 205. Third, the Commission is prohibited under a traditional analysis from retroactively changing a rule, because the rule did not clearly prohibit charging the benchmark with jointly provisioned access, and retroactively applying the rule would have materially harmful impact on CLECs.

If you have any questions regarding this request, please call the undersigned.

Sincerely,

Gregory J. Vogt
Counsel for NewSouth Communications, Inc.

cc: Christopher Libertelli
William F. Maher, Jr.
Tamara Preiss